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Public Prosecutor v Tang Ai Chuo & Anor

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 42-3 OF 1999
TEE AH SING J
15 OCTOBER 1999

B ***Criminal Procedure*** *— Forfeiture — Dangerous drugs — Properties seized by police under s 25 of Dangerous Drugs (Forfeiture of Property) Act 1988 — Procedure where claims to seized property were referred to sessions court — Whether s 32 of the Act permits use of affidavit to support respondent's claim on property — Dangerous Drugs (Forfeiture of Property) Act 1988 ss 8, 25 & 32*

C On 3 November 1998, the learned Sessions Court Judge in Sibu had ordered that the properties seized by the police under s 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') be released to the respondents. In the proceedings before the learned sessions court judge, affidavits have been used by the respondents to prove their claim to the properties. Thus the learned sessions court D judge had adopted the procedural requirements similar to s 8 of the Act. The appellant appealed.

Held, setting aside the order of the sessions court judge and ordering a retrial before another sessions court judge:

Under s 8, since it is the Public Prosecutor who asserts that the E property ought to be forfeited, the burden is therefore on him, whereas under s 32, the burden would be on the claimant who asserts that he is lawfully entitled to the property. Therefore, the proceedings under ss 8 and 32 of the Act are separate and distinct. Each section stands on its own and there is no need to allude to the procedures under s 8 for claims under s 32 of the Act (see p 34C–D); *PP v Tan Lee Kok* F [1998] 2 MLJ 65 followed. Section 32 of the Act does not permit the use of affidavits. The proper procedure would be for the respondents to adduce evidence on oath before the learned sessions court judge to support their claim by the calling of witnesses (see p 34F).

G **[Bahasa Malaysia summary**

Pada 3 November 1998, Hakim Mahkamah Sesyen di Sibu yang arif telah memerintahkan bahawa harta-harta yang disita oleh pihak polis di bawah s 25 Akta Dadah Berbahaya (Perlucuthakan Harta) 1988, dilepaskan kepada responden-responden. Di dalam prosiding di H hadapan hakim mahkamah sesyen yang arif, afidavit-afidavit telah digunakan oleh responden-responden untuk membuktikan tuntutan mereka terhadap harta-harta tersebut. Oleh itu, hakim mahkamah sesyen yang arif itu telah menerima dan mengamalkan keperluan-keperluan prosedural yang sama seperti s 8 Akta tersebut. Perayu telah membuat rayuan.

I **Diputuskan**, mengetepikan perintah hakim mahkamah sesyen dan memerintahkan satu perbicaraan semula di hadapan seorang hakim mahkamah sesyen yang lain:

Di bawah s 8, memandangkan bahawa Pendakwa Raya yang menegaskan bahawa harta tersebut sepatutnya dilucuthakkan, beban itu terletak di atas beliau, manakala di bawah s 32, beban tersebut akan terletak di atas penuntut yang menegaskan bahawa beliau berhak secara sah kepada harta tersebut. Oleh demikian, prosiding-prosiding di bawah ss 8 dan 32 Akta tersebut adalah berasingan dan berbeza. Setiap seksyen berdiri dengan sendirinya dan tiada keperluan untuk secara tidak langsung menyentuh prosedur-prosedur di bawah s 8 untuk tuntutan-tuntutan di bawah s 32 Akta tersebut (lihat ms 34C–D); *PP v Tan Lee Kok* [1998] 2 MLJ 65 diikut. Seksyen 32 Akta tersebut tidak membenarkan penggunaan afidavit-afidavit tersebut. Prosedur yang betul adalah untuk responden-responden mengemukakan keterangan bersumpah di hadapan hakim mahkamah sesyen yang arif bagi menyokong tuntutan mereka dengan memanggil saksi-saksi (lihat ms 34F).]

Notes

For cases on forfeiture of property under dangerous drugs legislation, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1436–1452.

Cases referred to

PP v Tan Lee Kok [1998] 2 MLJ 65 (folld)

Legislation referred to

Dangerous Drugs (Forfeiture of Property) Act 1988 ss 8, 25, 32

Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor) for the appellant.

David Kwok (*Ting Soon Pang* with him) (*Wong Orlando Chua & Co*) for the respondents.

Cur Adv Vult

Tee Ah Sing J: This is an appeal against the decision of the learned Sessions Court Judge, Sibu who had ordered that the properties seized by the police under s 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') be released to the respondents.

The relevant parts of s 32 of the Act reads as follows:

(1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and —

(a) no prosecution for any offence under any law is instituted with regard to such property;

(b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and

(c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952,

within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.

(2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in para (c) of sub-s (1), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a Sessions Court for its decision.

(3) The Sessions Court to which a claim is referred under sub-s (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

I have perused the record of appeal. There is the affidavit of ASP Sylvia ak Laman at pp 4 to 49 of the record of appeal. There is the affidavit of investigation officer, ASP Kamaludin b Kassim at pp 50–58 of the record of appeal. There is the affidavit of the first claimant — Madam Tang Ai Chuo at pp 64 to 70 of the record of appeal. There is also the supplementary affidavit of the first claimant at pp 71 to 82 of the record of appeal. There is also the affidavit of the second claimant, Mr Yong King Sii at pp 90 to 95 of the record of appeal.

So it is clear that in the proceedings before the learned sessions court judge, affidavits have been used by the respondents to prove their claim to the properties. In other words, the learned sessions court judge had adopted the procedural requirements similar to s 8.

However, the Court of Appeal in the case of *PP v Tan Lee Kok* [1998] 2 MLJ 65 has held that in an application under s 32 of the Act the provisions of s 8 of the Act are not applicable to an application under s 32. His Lordship Shaik Daud JCA (in delivering the judgment of the Court of Appeal) at p 71 had succinctly said:

> As for s 32 of the Act, it applies to any property seized, such as under s 25 of the Act. The seizure in the present case is under s 25 of the Act. Having seized such properties, and if no prosecution is instituted (s 32(1)(a)) or if no proceedings commenced by the Public Prosecutor, such as under s 8 (s 32(1)(b)) and no claim is made by anyone within a period of three months, (s 32(1)(c)) then the seized property or properties stands forfeited after the expiration of the said three months.
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> If within the three months from the date of the seizure, a claim in writing is made by anyone as in the case in the present appeal, the Public Prosecutor is required within fourteen days after the expiry of the three months, to refer such claim to the Sessions Court for its decision (s 32(2)). Unlike the provisions under s 8, no application need be made by anyone in the Sessions Court, nor is the Sessions Court required to be satisfied that any provisions

has been complied with except perhaps that the claim is made in writing within three months from the date of the seizure. Upon being referred to under s 32(2), then pursuant to s 32(3), the Sessions Court is required to issue a summons to the person claiming and shall proceed to the examination of the matter. From this it can be seen that the law does not place the burden on the Public Prosecutor to satisfy the court that the seizure was proper, or that the property ought to be forfeited, on the contrary the law places a burden on the person who made the claim to answer the summons. Section 32(3) places the burden upon the person making the claim 'upon proof that he is lawfully entitled thereto.' Section 32, therefore, places no burden on the Public Prosecutor to proof anything. It merely places the burden to refer the claim to the Sessions Court. Therefore, under s 32, the role of the Public Prosecutor is merely to forward the claim and as has been well put by the Deputy Public Prosecutor, the role of the Public Prosecutor is that of a 'forwarding agent'. In fact, the procedure both in s 8 and in s 32 is consistent with s 101 of the Evidence Act 1950, which provides that the burden of proof is on the person who asserts a thing. Under s 8 since it is the Public Prosecutor who asserts that the property ought to be forfeited, the burden is therefore, on him, whereas under s 32 the burden would be on the claimant who asserts that he is lawfully entitled to the property.

Therefore, the proceedings under ss 8 and 32 of the Act are separate and distinct. Each section stands on its own and there is no need to allude to the procedures under s 8 for claims under s 32 of the Act.

We are, therefore, of the view that the learned judge erred in coming to the conclusion that the procedure in s 32 of the Act is unclear and that for claims under s 32, the Court is required to adopt the procedures under s 8.

In our case the respondents have filed affidavits to support their claim. In other words, the respondents have used the procedures under s 8 of the Act which allows the use of affidavits to file affidavits to support their claim under s 32 of the Act.

I am of the view that this is clearly wrong as s 32 of the Act does not permit the use of affidavits.

In my considered opinion, the proper procedure would be for the respondents to adduce evidence on oath before the learned sessions court judge to support their claim by the calling of witnesses (including themselves as witnesses) to be examined-in-chief, cross-examined and re-examined akin to the procedure for a full trial be it a civil or criminal trial. Similarly, if the respondents intended to tender documents as evidence they must comply with the Evidence Act, 1950.

The learned sessions court judge erred in law when she relied on the affidavits of the respondents with the documentary exhibits annexed thereto as evidence. And this has vitiated the proceedings before the learned sessions court judge.

In the interest of justice, I set aside the order of the learned sessions court judge made on 3 November 1998 and order a retrial before another sessions court judge.

Order accordingly.

Reported by Benjamin Yong